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CASE NO. 87-1559 (2)

FILED
APR 4, 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF OHIO

Petitioner

V.

William E Murphy

Respondent

RESPONDENT'S BRIEF IN OPPOSITION

14

QUESTIONS PRESENTED

Whether this Court should limit **Ybarra v. Illinois**, 444 U.S. 85 (1979), and retreat to a view that the Fourth Amendment protects places and not people?

Whether this Court should substitute a test of subjective good faith for that of objective good faith in warrantless seizure cases, thereby eviscerating the fundamental protections afforded by an objective finding of probable cause in warrantless seizures?

LIST OF PARTIES

Pursuant to Rules of the Supreme Court of the United States, Rule 21(1)(b), the parties to this case are listed below:

Counsel for Petitioner The State of Ohio, PHILLIP D. BOGDANOFF, Assistant Prosecuting Attorney, 53 East Center Street, Akron, Ohio 44308.

Counsel for Respondent William E. Murphy [1825 Schiller Street, Cuyahoga Falls, Ohio 44221], STEPHEN D. HARDESTY, 1010 CitiCenter Building, 146 South High Street, Akron, Ohio 44308; and J. DEAN CARRO, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325.

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CASE NO. 87-1558

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF OHIO,

Petitioner,

-vs-

WILLIAM E. MURPHY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND
HONORABLE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

The Respondent, WILLIAM E. MURPHY, respectfully requests that this Court deny the State's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Respondent Murphy agrees with the State's recitation of the facts in this case.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THIS COURT'S DECISION IN **YBARRA V. ILLINOIS**, 444 U.S. 85 (1979), SERVES TO PROTECT EXPECTATIONS OF PRIVACY OF ANY INDIVIDUAL ON ANY PREMISE WHERE A SEARCH WARRANT IS EXECUTED. AS SUCH, THE STATE'S CONTENTIONS ARE WITHOUT MERIT.

The State of Ohio seeks to interest this Court to accept this case on two grounds. First, that **Ybarra v. Illinois**, 444 U.S. 85 (1979), does not apply to the search of innocent third parties merely present in a private dwelling when a search warrant is executed. Essentially, the State seeks to distinguish this Court's holding in **Ybarra, supra**, on the grounds that the search here was in a private dwelling and not a public place as in **Ybarra, supra**. The State also collaterally argues that persons found on the private premises, during the execution of a search warrant, somehow have a lowered expectation of privacy. Second, the State argues that a "good faith" exception should be recognized when a police officer violates established precedent by this Court as long as the officer "believes" the search to be proper. Basically, the State seeks to substitute a subjective good-faith exception for the well-recognized objective good-faith exception.

In response, Respondent Murphy submits that acceptance of the State's first position would focus inquiry on the nature of the place where the person is searched rather than focusing on the individual's expectation of privacy in the sanctity of his person. Second, to allow a subjective good-faith exception under these circumstances would contravene the very doctrine of good-faith exceptions created by this Court and eviscerate the meaning and purpose of the probable cause requirement.

The starting point for consideration here must be this Court's decision in **Ybarra v. Illinois, supra.**[1] The facts of **Ybarra** are strikingly similar to those at bar. In both cases, police obtained search warrants to arrest an individual and search a place for contraband. In **Ybarra, supra**, the warrant allowed a search of a public place. **Id.** at 88. In the case at bar, the warrant designated the place to be searched, which was a private residence. In both cases, individuals were present at the time of the execution of the warrant who were not named in the warrant and who did not manifest either suspicious behavior or an attempt to conceal items. **See Ybarra** at 90 (State Court of Appeals Decision at 6; Appendix to Petition for Writ of Certiorari at 45).

Finally, in both cases the police officers conducted one frisk or pat-down followed by a second frisk which yielded contraband. **Ybarra** at 88-89 (Court of Appeals Decision at 2-3; Appendix to Petition for Writ of Certiorari at 37-38).

The State, in **Ybarra**, sought to justify the first frisk by relying on **Terry v. Ohio**, 392 U.S. 1 (1968). The Court rejected that attempt by finding that even a **Terry** limited stop required some "reasonable belief that [Ybarra] was armed and presently dangerous." **Ybarra** at 93. Since the State was unable to "articulate any specific fact that would have justified" this suspicion, the initial frisk was unsupportable. **Id.**

The underlying foundation for the holding in **Ybarra** was that a person's mere proximity to criminal activity without more will not establish probable cause. In the absence of probable

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[1] It is interesting to note that when the State cites to and discusses the facts of **Ybarra**, it cites to the Court's "syllabus." (Petition for Writ of Certiorari at p. 13) While the syllabus states the law of the case in Ohio Supreme Court decisions, the same is not true with the syllabi in this Court's decisions. **See, e.g. Perkins v. Benguet Mining Co.**, 342 U.S. 437, 441 N. 3 (1952); **United States v. Detroit Lumber Co.**, 200 U.S. 321, 337 (1905).

cause, "particularly with respect to that person" searched, the person's legitimate expectation of privacy is preserved and no search may occur. If a search does occur, the fruits of the search must be suppressed. **Id.** at 91.

The position the State advocates here would allow the police to search <u>any</u> person present on the premises to be searched without probable cause. This Court has never advocated such an approach, and the State suggests no valid policy consideration for the Court to rely upon in adopting this position. The State has not suggested that the Supreme Court of Ohio has decided a federal question in conflict with any other state court of last resort, or with a federal court of appeals. See Rules of the Supreme Court of the United States, Rule 17(1)(b).

What the State seeks to achieve here is a reworking of fundamental predicates of Fourth Amendment search and seizure law. Basically, the State suggests that **Ybarra** should be distinguished from the case at bar due to the fact that the place searched here was a <u>private</u> dwelling (Petition for writ of Certiorari at 24). The State suggests then that this Court's focus should be on the nature of the place searched. This position is unsupportable. At least since 1967, this Court has consistently declined to adopt such a view. In **Katz v. United States**, 389 U.S. 347 (1967), the Court held:

> ". . . the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. **Id.** at 351-52.

Unless this Court desires to overrule **Katz v. United States, supra**, and its many progeny, the State's position is untenable.

II.

TO MAINTAIN THE CONSTITUTIONAL INTEGRITY OF THE GOOD FAITH EXCEPTION, THIS COURT MUST CONTINUE TO RECOGNIZE AN OBJECTIVE STANDARD.

The State next contends that this Court should extend its recent adoption of a good-faith exception to a warrantless search "where the officers conducting the search had an objective reasonable belief that their search was proper." Petition for Writ of Certiorari at 28. By this argument, the State grossly misperceives the protections afforded by the Fourth Amendment; the purpose of probable cause; and the significance of the good-faith exception.

This Court has recognized a good-faith exception to the exclusionary rule in only two limited situations. In **United States v. Leon**, 468 U.S. 897 (1983), the Court recognized this exception when police officers acted upon a "search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." **Id.** at 900. The second situation, as found in **Illinois v. Krull**, ___ U.S. ___, 107 S.Ct. 1160 (1987), exists when a warrantless search occurs pursuant to a state statute which, at the time of the search, is facially constitutional, but is later declared to be unconstitutional. **Id.** at 1170.[2]

As this Court emphasized in **Leon, supra**, and again in **Krull, supra**, the decision to find a good-faith exception is directly related to the purpose to be served by the exclusionary rule. Initially, it is well established that the exclusionary rule is not constitutionally mandated and is not intended to create a personal constitutional right on behalf of the aggrieved party. Rather, it is a "judicially created remedy

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[2] In light of this Court's decision in **Krull, supra**, the State's assertion that there is "confusion among the lower courts concerning whether the **Leon** decision is limited to warrant searches" is curious (Petition for Writ of Certiorari at 26).

designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . ." **United States v. Leon** at 906, quoting **United States v. Calandra**, 414 U.S. 338, 348 (1974). This focus on the deterrent purpose of the exclusionary rule prompted the Court to evaluate the cost and benefit of suppression of evidence. In this regard, the Court considered three factors:

> "1) First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates.
>
> "2) Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.
>
> "3) Third, and most important, we discern no basis, and are offered none, for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate." **Leon, supra** at 916.

The Court was quick to note, however, that any good-faith exception was to be determined objectively, and not subjectively. **See Leon, supra** at 915, n. 13, citing **Henry v. United States**, 361 U.S. 98, 102 (1959).

> "good faith on the part of the arresting officers is not enough. Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed."

The Court took additional pains to emphasize that the "standard of reasonableness we adopt is an objective one." **Leon, supra**, at 919, n. 20. The Court also noted that "the objective standard we adopt, moreover, requires officers to have a reasonable knowledge of what the law prohibits." **Id. See also Leon** at 922, n. 23; **Illinois v. Krull**, 107 S.Ct. at 1170.

Application of these principles to the case at bar demonstrates that the establishment of a subjective good-faith exception would effectively eviscerate the Fourth Amendment. In the two cases where the Court has found a good faith expansion, it has only done so where the objective circumstances presented to the police permitted a finding of proper, lawful behavior. In the case at bar, the State would place a premium on a police officer's ignorance and allow for a good-faith exception where the officer believed he or she was acting properly. Thus, an officer who, through ignorance, did not know of certain constitutional protections would be permitted to violate a defendant's rights whereas a conscientious officer, acting in compliance with constitutional protections, would not be able to shield himself or herself. Probable cause is an objective test based upon the facts known to the officer at the time. An officer is presumed to know the law. A good-faith exception on the basis of a misapplication of long-standing constitutional precedent would be a contradiction in terms. It cannot be allowed.

Neither has the State demonstrated that the State Court of Appeals has decided this issue in any way which is inconsistent with **Ybarra v. Illinois, supra.** **See**, Rules of the Supreme Court of the United States, Rule 17(1)(c).

Applying the **Leon** factors to the case at bar further demonstrates the inapplicability of a good-faith exception on the facts presented. In this case, the police officers had no warrant to arrest or authority to search Respondent Murphy. No "detached and neutral" magistrate had issued an order allowing such actions. Thus, under the first **Leon** criterion, the misconduct here was solely that of the police.

Applying the second **Leon** criterion, the police themselves made the decision to violate this Court's holding in **Ybarra**,

supra. They cannot point to any objective authorization that could have been interpreted by them to allow this search.

Finally, exclusion of the evidence here is exactly the situation the exclusionary rule was meant to effect. The action here was solely that of the police and clearly unconstitutional. Hopefully, the exclusion of the evidence here will deter the police in the City of Akron from violating this Court's clear holdings.

CONCLUSION

As a result of the above arguments, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

(Separate Pleading)